

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

WRITTEN DIRECT STATEMENT OF GOOGLE LLC

Volume 1 of 3

**TABLE OF CONTENTS FOR THE
WRITTEN DIRECT STATEMENT OF GOOGLE LLC**

Volume 1

<u>Tab</u>	<u>Content</u>
A	Introductory Memorandum to the Written Direct Statement of Google
B	Proposed Rates and Terms of Google (Clean)
C	Proposed Rates and Terms of Google (Redline)
D	Index of Witness Testimony
E	Index of Exhibits
F	Declaration and Certification Regarding Restricted Materials
G	Certificate of Service

Volume 2

<u>Tab</u>	<u>Content</u>
A	Written Direct Testimony of Carletta Higginson
B	Written Direct Testimony of Gregory K. Leonard

Volume 3

<u>Tab</u>	<u>Content</u>
A	Google Ex. 01 – 93

TAB A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)

Docket No. 21-CRB-0001-PR
(2023-2027)

**INTRODUCTORY MEMORANDUM TO THE
WRITTEN DIRECT STATEMENT OF GOOGLE LLC**

Google is committed to providing fair compensation to rights holders for licenses to their copyrighted music in its online streaming products. Through YouTube, Google has created a platform that provides significant value for the music industry—indeed, for creators of all kinds, including new participants who previously did not have a platform to share their creative expression. YouTube users can listen to the latest release from their favorite artist, play music videos, compare the many artists who cover the song, watch fan reaction videos, and create their own YouTube videos using the song. To license the many ways music is used on YouTube, Google has entered into [REDACTED] of royalty-bearing licensing agreements with rights holders, [REDACTED]. In just the twelve-month period ending March 2021, Google paid out **\$4 billion** to music rights holders.

Though Google relies on Section 115 for only some of the music uses on YouTube, Google’s commitment to fair compensation is undiminished. While Google stands by the positions it has taken in the *Phonorecords III* proceeding, it will not seek to relitigate the rate issue here or

seek a change in those rates, whether they remain the same or are reduced as a result of that proceeding.¹ While the final *Phonorecords III* rates are still being determined, Google agreed to pay licensor music publishers the [REDACTED]. Importantly, Google and music publishers have [REDACTED]. These agreements are direct evidence of what Google has voluntarily agreed to pay willing sellers.

Google, however, does seek a change in the terms to better align the regulations with the modern music business. *Phonorecords III* addressed a market consisting of predominantly music-only services. Those market assumptions no longer hold true. There is a strong trend toward more diverse service offerings that include many types of content, such as podcasts, audiovisual works, and user-generated content. Google, for example, has enhanced its offerings to give consumers access to both songs and videos on either an ad-supported or subscription basis. This trend will only accelerate as users increasingly consume music online and expect more varied offerings.

The regulations need to provide greater clarity on how to calculate royalty liabilities when a service provider offers a variety of content offerings, some of which are eligible for licensing pursuant to Section 115 and some of which are not. Section 115 authorizes rates for “Covered Activities” only. This creates a statutory requirement to differentiate between eligible and non-eligible activities. Except for classic bundling—where separately priced goods or services are sold for a combined price—the current regulations lack the details of how to implement that allocation. More concrete guidance is needed especially in light of recent profound changes in the market.

¹ Google expressly reserves its right to supplement its position if the *Phonorecords III* remand results in an unexpected and materially different economic structure or rates that exceed the highest currently being advocated.

Fortunately, the market has already worked out these details. In each of Google’s license agreements with music publishers, the parties have worked through what terms make sense when Google provides a variety of content. They have agreed to [REDACTED]. They have also recognized that [REDACTED]. Importantly, both the major publishers and smaller publishers have agreed to this framework.

Google’s terms proposal sets forth the specific terms to be adopted as the governing regulations. Publishers have already [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

In short, Google and [REDACTED] of its music publisher partners have entered into agreements that provide a direct benchmark for what willing buyers and sellers would agree to. These deals support Google’s request that the ultimate *Phonorecords III* rates be maintained for the *Phonorecords IV* period.² They also set forth the [REDACTED]. Google and [REDACTED] have agreed [REDACTED].

² Google captions its pleadings in this proceeding with “2023 - 2027” given how the *Phonorecords IV* period has been identified by the Copyright Royalty Judges. Whether the rates established in this proceeding should apply to the period commencing January 1, 2023 is subject to the requirements of 17 U.S.C. § 803(d)(2)(B). Google proposes that the rates to be established commence on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register.

I. *PHONORECORDS IV* ROYALTY RATE REQUEST

Google does not seek any change in the rates in this proceeding. Google requests that the Copyright Royalty Judges adopt for the entire *Phonorecords IV* period the rates determined for 2022 in the *Phonorecords III* remand proceeding, provided such rates do not exceed the rates parties are advocating for in that proceeding or include a per play rate.

Google further requests that the Judges make changes to the terms as set forth in Tab B (clean) and Tab C (redline) to provide greater clarity on allocation, including the following:

- Service Provider Revenue and Total Cost of Content (“TCC”), where applicable, are to be allocated between music and non-music content;
- Service Provider Revenue and TCC, where applicable, are to be allocated between Section 115-eligible and non-Section 115-eligible activities with respect to musical works;
- The Per Subscriber Minimum (“PSM”) for Subscription Offerings is to be allocated between Section 115-eligible and non-Section 115-eligible activities;
- TCC should be removed solely from the all-in royalty for non-Subscription Offerings;
- Defined terms in the regulations should be based upon defined terms negotiated in the free market between willing buyers and willing sellers and be consistent with those set forth in 17 U.S.C. § 115(e);
- Discounts already agreed to by publishers—for things like family plans, student plans, annual and six-month plans, winback offers, and limited device offerings—should be adopted in the regulations; and
- The revenue base against which a percentage of revenue royalty will be applied should include exclusions and deductions voluntarily agreed to by music publishers, including taxes, and platform and distribution fees (*e.g.*, amounts paid to Apple for subscriptions sold through iOS applications).

II. SUMMARY OF ARGUMENT

Among the best evidence of the current market for licensing Section 115 eligible content are Google’s agreements. Google’s proposals are not based on what willing buyers and willing sellers [REDACTED]

[REDACTED]

1. The Shift to WBWS Does Not Require a Shift in the Statutory Rates

The *Phonorecords IV* proceeding is the first time statutory mechanical royalties will be established under the “willing buyer and a willing seller” standard (“WBWS”). Under WBWS, “[t]he Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 115(c)(1)(F). This calls for the establishment of rates and terms “that would have been set in an effectively competitive market.” Final Determination, Web V, Dkt. No. 19-CRB-0005-WR (2021-2025), at 6 (Sep. 20, 2021) (noting that the D.C Circuit found this WBWS formulation to be “reasonable”).

The shift to WBWS, however, does not require a change in the statutory rate. That is because many of the 801(b)(1) factors can be achieved by a WBWS outcome. For example, “maximizing the availability of creative works to the public” can be understood as having the economically efficient amount of works available to the public, which willing buyers and sellers would agree to in an effectively competitive market. The goals of securing a “fair return” to the copyright owner and a “fair income” to the copyright user can be interpreted as “fair market value,” achieved by an effectively competitive WBWS outcome. Willing buyers and sellers would also presumably take into account relative contributions and seek to minimize disruption.

The Subpart B Settlement supports the position that WBWS does not require changing the statutory rates. The record labels and publishers submitted a voluntary settlement in this proceeding, in which they agreed to maintain the rates and terms agreed to in *Phonorecords III* (“Subpart B Settlement”). Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations, Phonorecords IV, Dkt. No. 21-CRB-0001-WR (2023-2027) (May 25, 2021). Absent settlement, these rates and terms would have been determined using the 801(b)(1) factors in *Phonorecords III* and using the WBWS standard here in *Phonorecords IV*. Despite the change in standard, labels and publishers agreed there should be no change in the rates or terms.

2. Google’s Agreements with Publishers Establish the WBWS Outcome

The *Phonorecords IV* rates and terms must reflect the license that a willing buyer and a willing seller would agree to. The best evidence of that is what willing buyers and willing sellers have *actually* agreed to in license agreements negotiated at arm’s length in the marketplace. Assuming similar circumstances, such evidence has been deemed persuasive, reliable, and the best evidence of a WBWS outcome. See Final Determination, Web V, Dkt. No. 19-CRB-0005-WR (2021-2025), at 293 (Sep. 20, 2021) (“the contract terms negotiated by willing buyers and willing sellers, in evidence from similar markets, are persuasive.”); *id.* (“several contract terms negotiated by willing buyers and willing sellers on matters such as this one serve as reliable evidence.”); *Boyce v. Soundview Tech. Grp. Inc.*, 464 F.3d 376, 387 (2d Cir. 2006) (“an arm’s length transaction ... is the best evidence of (and often the easiest method to determine) fair market value.”).

Google has negotiated [REDACTED] of license agreements with major music publishers, non-major music publishers, and so-called independents that [REDACTED].³ These agreements include [REDACTED]

³ There are currently four: YouTube Music, YouTube Music Premium, YouTube Premium, and YouTube.com.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] While Google has produced the two agreements in discovery, [REDACTED]

[REDACTED] Accordingly, Google does not rely on these agreements.

While that neither changes its proposal or arguments, Google’s case is based on the remaining agreements (the “Google Agreements”).

The Google Agreements are highly relevant benchmarks for determining the rates and terms for the Section 115 license. The parties to these agreements negotiated at arm’s length in the free market are the same buyers and sellers in the statutory WBWS standard. These agreements concern [REDACTED] Many of

these agreements also [REDACTED]

[REDACTED]

3. The Google Agreements Demonstrate that the *Phonorecords III* Royalty Rates Should Be Maintained Under a WBWS Standard

The Google Agreements include [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See Written Direct Testimony of Carletta Higginson (Vol. 2, Tab A, “Higginson WDT”) ¶ 23.

The most apposite rate categories for this proceeding are [REDACTED]

[REDACTED]

[REDACTED]

that might otherwise make them “inapposite as benchmarks in this proceeding.” *See Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phono III)*, Final Rule, 84 Fed. Reg. 1918, 1941 (Feb. 5, 2019). These are also not [REDACTED] [REDACTED]—where Google claims DMCA “safe harbor” protection that might “distinguish[] the YouTube market from the market for streaming services.” *Id.* at 1942.

For these two categories, Google and music publishers agreed to [REDACTED]

[REDACTED]

Google is participating in the remand and stands by the adjustments and proposals it made in *Phonorecords III*. In the meantime, Google agreed to [REDACTED]

[REDACTED]

[REDACTED] Google has also agreed under its voluntary licenses to [REDACTED]

[REDACTED]

[REDACTED]

The rates negotiated between Google and publishers for these categories were not compelled by Section 115. Google agrees to pay Section 115 rates even though the definitions for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This was intentional. The parties agreed to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Higginson WDT ¶ 32.

[REDACTED]

Because the parties agreed to [REDACTED]
[REDACTED] the Google Agreements provide a direct benchmark of what willing buyers and willing sellers agreed to for interactive streams and conditional downloads. That these agreements were reached in the so-called “shadow” of the statutory license does not disqualify them as a benchmark. *See Phonorecords III* Final Rule, 84 Fed. Reg. at 1941. The statutory license provides a “default rate for the licensing parties” and any deviations from them “are revealing.” *Id.* A voluntary agreement *not* to deviate from this “default rate” can be equally revealing. [REDACTED]

[REDACTED] Their willingness to do so anyway supports Google’s proposal to maintain those rates in the *Phonorecords IV* period.

Finally, [REDACTED]
[REDACTED]

[REDACTED] The benchmark thus demonstrates that the *Phonorecords IV* rates should remain constant throughout the five-year term.

4. The Google Agreements Demonstrate That [REDACTED] [REDACTED]

Because Google and music publishers agreed that [REDACTED]
[REDACTED]
[REDACTED] This is straightforward when revenue and costs can be directly attributable to specific pieces of content, [REDACTED] When direct attribution is not feasible—as in the case of a subscription—an allocation is used. Although agreements [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Every one of the Google Agreements includes [REDACTED]

Of course, different methodologies can be used to achieve the same result.

[REDACTED] If Google were prohibited from [REDACTED]

[REDACTED] For example, if Google had to pay [REDACTED] of each \$11.99 monthly subscription fee to YouTube Premium for just Section 115 activities, [REDACTED]

[REDACTED]

[REDACTED] Google would dramatically overpay music publishers. It makes economic sense instead to allocate by content type because demand for the service, and thus the subscription

revenue generated from users, is driven by the different content types. This is what [REDACTED]

Moreover, Section 115 makes clear that Copyright Royalty Board proceedings “shall determine reasonable rates and terms of royalty payments *for the activities specified by this section.*”⁴ Simply stated, the royalty rates determined must not be payable on other, non-Section 115 covered activities. Accordingly, royalties must be calculated based on the revenues derived solely from Covered Activities, a term defined in Section 115 of the Copyright Act through the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 to mean “the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, which such activity qualifies for a compulsory license under [Section 115].” This statutory directive requires differentiation between activities that are Section 115-eligible and those that are not.⁵ Thus, to comply with the statutory mandate, there needs to be [REDACTED] rather than [REDACTED]

5. Google’s License Agreements Set Forth [REDACTED]

The statutory directive is reflected in the current regulations, which provide that royalty payments are to be based on the revenue derived from “a Service Provider’s engagement in Licensed Activity” (as opposed to revenue derived from other, non-Section 115 activity). 37 CFR

⁴ 17 U.S.C. § 115(c)(1)(E) (emphasis added).

⁵ This is similar to the analysis that occurs in patent infringement actions. The patent statute entitles a prevailing patent owner to damages for the infringing activity. That directive requires allocation to isolate the infringing activity. *See, e.g., Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1228 (Fed. Cir. 2014) (noting the “need to apportion the ultimate royalty award to the incremental value of the patented feature from the overall product”). One option is to award the reasonable royalty a “willing licensor” and a “willing licensee” would agree to in a “hypothetical negotiation.” Under this willing licensor/willing licensee standard, consideration must be given to “[t]he portion of the realizable profit that should be credited to the [infringement] as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.” *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *mod. and aff’d*, 446 F.2d 295 (2d Cir. 1971), *cert. denied*, 404 U.S. 870 (1971). Any royalty rate calculation must be allocated so it reflects only the value of the patented content and not the value of any non-patented content.

§ 385.2. The regulations acknowledge the need for allocation. But except for classic bundling, where two or more separately priced goods or services are sold for a combined price, the regulations lack clarity in how allocations should be made.

Allocation was not a major focus in *Phonorecords III* or prior proceedings, because the service participants were primarily offering stand-alone 115-eligible music services at the time. Google has since deprecated its stand-alone service (Google Play Music). The other service participants, like Spotify and Amazon, are also trending toward multi-faceted offerings. Thus, it is important to spell out in greater detail how revenues, TCC, and PSMs should be allocated to ensure that only Section 115-eligible activities are paid for under the Section 115 license.

The Google Agreements set forth in great detail the [REDACTED]
[REDACTED] Google has already worked through, via arm's-length negotiations with the music publishers, the important details. The Google Agreements set forth the [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] These direct agreements provide a reliable benchmark for WBWS license terms for streams covered by Section 115.

These provisions are consistent with the Section 115 compulsory license. The Google Agreements generally [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] that the methodologies in the Google Agreements are a legitimate way to [REDACTED]
[REDACTED]

Google therefore proposes the following specific terms:

(i) [REDACTED]

Google's agreements include [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

For advertising revenues, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Otherwise, copyright owners would be compensated for user engagement unrelated to their content. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The Google Agreements also include [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Both [REDACTED] and [REDACTED] are definitions that are alternatives to the definition of "Service Revenue" currently set forth in the regulations, which was taken from the *Phonorecords II* proceeding, which the Copyright Royalty Judges rejected in *Phonorecords III* pre-remand. If the Copyright Royalty Judges continue to reject the *Phonorecords II* rates and terms as a relevant benchmark, then Google believes the *Phonorecords*

III definition of Service Revenue should also be rejected for lacking marketplace support.⁶ Instead, the definitions that Google has negotiated in the Google Agreements represent direct evidence of what has been negotiated between willing buyers and willing sellers.

Notably, [REDACTED]

[REDACTED] This type of structure could result in royalty liabilities exceeding revenues and would disincentivize Google to encourage user engagement. [REDACTED] is evidence that such a rate structure lacks any support in the free market and would not be agreed to under a WBWS standard.

(ii) All-in Rate

[REDACTED] This structure was adopted by both Google and music publishers in arm's length transactions, including for [REDACTED] The Section 115 regulations should continue to include the "all-in" rate [REDACTED] This has been the norm in the marketplace since *Phonorecords I*.

(iii) Allocation of the PSM

For [REDACTED] a \$0.50 PSM, which is paid to an individual music publisher based upon the publisher's share of activity, [REDACTED]

⁶ Google's voluntary agreements with music publishers, [REDACTED] Applicable definitions for [REDACTED] and [REDACTED] are negotiated in arm's length transactions.

[REDACTED]

[REDACTED] In the context of voluntary licenses, [REDACTED]

[REDACTED] That is, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Under the statutory license,

however, where Google will still have to pay music publishers [REDACTED]

[REDACTED] the CRJ's regulations must provide for a further

allocation of the PSM between Section 115 and non-Section 115 activities.

(iv) [REDACTED]

Google has [REDACTED]

[REDACTED] In each instance, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Discounted PSMs are appropriate for all of these plans because they permit a service provider to attract customers with a lower willingness to pay, encourage new subscribers who may provide significant lifetime value, encourage promotional efforts by third parties who can help drive new subscriptions, and permit flexibility in pricing for new and innovative services, such as lower-priced offerings for non-mobile devices. Provisions regarding the promotional plans are

[REDACTED]

To the extent the CRJs refused to adopt discounted offerings beyond student plans and family plans in *Phonorecords III* for lack of evidence, the [REDACTED]

(v) Free Trial Accounts

Given the challenge of acquiring new subscribers, music publishers have agreed to [REDACTED]

In addition, the current regulations are inconsistent with Google's [REDACTED]

The regulations should reflect [REDACTED] of 'Free Trials' to empower licensees to entice new subscribers to their paid services without having to pay full-price PSMs during limited free trials, [REDACTED]

(vi) Deductions

Google's negotiated definition of [REDACTED]

[REDACTED] As these exclusions are standard in the marketplace and have been agreed to by publishers both large and small, there is no basis for excluding such deductions from the regulations governing Section 115 activities.

(vii) Late Fees

The Google Agreements [REDACTED] Under the regulations, if a statutory licensee fails to pay statutory royalties when due, the licensee may lose the benefit of the

statutory license upon receipt of notice from a copyright owner. This is already sufficient to deter untimely payments under Section 115.

Section 115 recognizes that imposing late fees may not be warranted given the applicable standard. Section 115(d)(8)(B) provides that “in any proceeding ... in which the Copyright Royalty Judges establish a late fee for late payment of royalties ..., such fee shall apply to covered activities under blanket licenses.” This permits but does not mandate late fees. When Congress amended Section 115 in 2018, it could have, but chose not to, include a late fee provision. Absent express Congressional direction, the inclusion of a late fee provision under a WBWS standard must be supported by marketplace evidence. The late fees in the existing regulations should be eliminated for lack of marketplace support.

(viii) Allocation of Amounts Payable to the Mechanical Licensing Collective

Once the royalty liability of a statutory licensee operating under Section 115 is determined, the royalty amount needs to be allocated among all musical works that have been used in interactive streams and conditional downloads. However, some of those works may be in the public domain or subject to voluntary licenses. The regulations should specify that only those royalties allocable for works still subject to copyright and not covered by a voluntary license should be paid to the MLC. To ensure that voluntary licenses are given precedence over the rates and terms established by the CRJs, the regulations should make clear that voluntary licensed works do not require payments to the MLC for the use of those works. Similarly, no royalties should be payable for works that are in the public domain.

III. SUMMARY OF TESTIMONY

1. Fact Witness—Carletta Higginson, Director and Global Head of Music Publishing, YouTube

Google will present in its Direct Case the testimony of Carletta Higginson, Director and Global Head of Music Publishing for the YouTube division of Google. Ms. Higginson is responsible for managing Google’s business partnerships with all major and independent music publishing companies and performing rights organizations for YouTube. While she was the Manager of Music Partnerships at YouTube, Ms. Higginson structured, negotiated, and secured many complex licensing and partnership agreements with music publishers and other parties.

Ms. Higginson will testify about Google’s music product offerings and its direct license agreements with music publishers. Google has negotiated [REDACTED] of direct license agreements in the free market with music publishers. These provide direct evidence of what a willing buyer (Google) and willing sellers (music publishers) have agreed to.

Ms. Higginson will explain that Google and music publishers have negotiated [REDACTED]

[REDACTED]

[REDACTED] Google and music publishers have agreed to [REDACTED]

[REDACTED]

[REDACTED] They have agreed to [REDACTED]

[REDACTED]

[REDACTED] the Google Agreements provide for the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Each of these agreements also sets forth in great detail how [REDACTED]

[REDACTED]

As Ms. Higginson will testify, [REDACTED]

[REDACTED] negotiated in arm's length transactions with those publishers. Without allocation, Google would end up vastly overpaying the music publishers and [REDACTED]

Ms. Higginson will also testify about the main terms that appear in the Google Agreements. Those agreements all include a [REDACTED] She will explain that Google [REDACTED]

[REDACTED] She will also explain how for advertising supported offerings are based solely on a [REDACTED]

**2. Expert Witness—Gregory K. Leonard, Ph.D.
Economist and Vice President, Charles River Associates**

Google will also present the testimony of its expert witness, Dr. Gregory K. Leonard. Dr. Leonard, an economist and Vice President at Charles River Associates, will evaluate Google's rate proposal for the services covered under 17 U.S.C. § 115 and 37 C.F.R. § 385, Subparts C and D, in light of Google's direct license agreements with music publishers and the WBWS framework.

For rates applying to interactive streams and limited downloads under 37 C.F.R. § 385, Subparts C and D, Dr. Leonard will testify that Google's proposal to push forward the final, non-appealable 2022 royalty rates is consistent with what willing buyers and willing sellers would agree to in arm's length negotiations. Dr. Leonard will explain that Google's license agreements with music publishers specify [REDACTED]

[REDACTED] In particular, Google's recent publisher agreements specify that the [REDACTED]

[REDACTED] As Dr. Leonard will testify, Google's voluntary license agreements with music publishers are the best evidence of what willing buyers and willing sellers would agree to. And as Dr. Leonard will further testify, [REDACTED]

Dr. Leonard will explain that the Subpart B Settlement is further evidence that willing buyers and willing sellers would agree to maintain the current rates. There, as he will explain, representatives of music publishers and record labels reached the same rate of 9.1 cents per permanent digital download ("PDD") that the music publishers and record labels agreed to in 2006—prior to the *Phonorecords III* proceeding. That the Subpart B Settlement rates have remained the same is further evidence that the Subpart C and D rates should also remain the same because, as Dr. Leonard will explain, it indicates both that (1) market conditions have not significantly changed since *Phonorecords III* in a manner that would warrant a change in the royalties for musical works, and (2) no change in the royalties for musical works is precipitated by the statutory change from the 801(b)(1) factors to the WBWS framework. Dr. Leonard will explain that this benchmark establishes that Google's proposal to maintain rates is conservative.

Dr. Leonard will also testify that [REDACTED] should be maintained. Each of Google's publisher agreements [REDACTED] Not a single one of these agreements [REDACTED] Google's license agreements are evidence that willing buyers and willing sellers have agreed—and therefore would agree, under the WBWS framework—[REDACTED]

In addition, Dr. Leonard will testify that Google's license agreements confirm that [REDACTED]

[REDACTED] Dr. Leonard will explain the trend in the market towards services that offer multiple types of content, only some of which are subject to the Section 115 License. As Dr. Leonard will explain, YouTube offers various types of content of which only a portion is Section 115-eligible activity. It would therefore be inappropriate to apply the statutory all-in rate for musical works to the full set of revenues for YouTube.

As Dr. Leonard will testify, Google's voluntary license agreements with music publishers

[REDACTED]
[REDACTED]

[REDACTED] This voluntary agreement to [REDACTED] is real-world evidence that willing buyers and willing sellers [REDACTED].

IV. CONCLUSION

The shift to the WBWS standard means that the focus should be on Google's many voluntary license agreements with music publishers. There is no better evidence of what a willing buyer and willing seller would agree to than the actual agreements between Google and the willing seller music publishers. The Google Agreements [REDACTED]
[REDACTED] and adopting the specific terms and structures in those agreements. [REDACTED]
[REDACTED]

Dated: October 13, 2021

/s/Victor Jih

Victor Jih

Gary R. Greenstein (DC Bar No. 455549)
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, N.W., 5th Floor
Washington, DC 20006
Tel. (202) 973-8849
Fax: (202) 973-8899
ggreenstein@wsgr.com

Victor Jih (Cal. Bar No. 186515)
Lisa D. Zang (Cal. Bar No. 294493)
Ryan Benyamin (Cal. Bar No. 322594)
Rebecca E. Davis (Cal. Bar No. 322765)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
Fax: (866) 974-7329
vjih@wsgr.com
lzang@wsgr.com
rbenyamin@wsgr.com
becca.davis@wsgr.com

Maura L. Rees (Cal. Bar No. 191698)
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel.: (650) 493-9300
Fax: (866) 974-7329
mrees@wsgr.com

TAB B

PROPOSED RATES AND TERMS OF GOOGLE LLC

Subpart A—Regulations of General Application

§385.1 General.

- (a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.
- (b) **Legal compliance.** Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.
- (c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.
- (d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part. The terms in this part shall be interpreted to prevent the double payment of royalties for Covered Activities.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Allocation means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Covered Activities and the denominator of which is the sum of

the number of Plays arising from Covered Activities and the number of Plays of Non-Eligible Works.

Annual Plans means a discounted plan where an End User subscriber pays a discounted price for a full year of access to a Subscription Offering.

Applicable Consideration means anything of value given for the identified rights to undertake a Covered Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Covered Activity but nevertheless provide consideration for the identified rights to undertake the Covered Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Covered Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Covered Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Bundle Percentage means [TBD based upon final, non-appealable determination in Phonorecords III].

Bundled Subscription Offering means a Subscription Offering providing Covered Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the Subscription Offering separate from the product(s) or service(s) with which it is made available (*e.g.*, a case in which an End User can buy a portable device and one-year access to a Subscription Offering for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Covered Activity means the activity of making a Digital Phonorecord Delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under 17 U.S.C. 115.

Demo Accounts means (1) accounts provided to business owners or operators for in-store demonstrations of an Offering to the public for private use and (2) Promoter Accounts.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for an amount of time not to exceed 31 days from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed 31 days), or in the case of a subscription plan, a period of time following the end of the applicable subscription.

End User means each unique person that (1) pays a subscription fee for an Offering during the relevant Accounting Period or (2) makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering beyond nominal amounts (e.g., \$1 per month per End User).

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior

to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes, and any carriage or in-app commission fees (if any). Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

Net Subscription Revenues means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering (pro rated for a Bundled **Subscription Offering** by multiplying the dollar value of the Bundled Subscription Offering by the Bundle Percentage)), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions. Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also

excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

Non-Eligible Works means a sound recording, whether or not embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, and all audiovisual works that include musical works and all audiovisual works without any musical works, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

Offering means a Service Provider’s engagement in Covered Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fees payable for the right to perform publicly musical works in any Offering.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promoter Account means an account used by a person who works for or on behalf of an original equipment manufacturer, wireless carrier, third party with whom Licensee has entered into an agreement to provide a bundled offering of two or more products or services, one of which includes a Covered Activity, a sound recording or musical work copyright owner, or an influencer, to demonstrate, promote, influence or encourage the use of a Covered Activity.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;
- (2) The Promotional Offering is made available to an End User for free or for a nominal fee (e.g., \$1).

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

- (1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—
 - (i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or
 - (ii) In the case of physical phonorecords:
 - (A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or
 - (B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.*, an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the

reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue means, for each Offering, and for each Accounting Period, the sum of Net Advertising Revenues, if any, and Net Subscription Revenues, if any.

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted subscription to a Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle Subscription Offering.

Total Cost of Content or TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP.

United States means the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Winback Offer means a Subscription Offering made available for free or for a discount to an End User that had previously subscribed to a Subscription Offering for over six months and whose subscription has lapsed.

§385.3 [Reserved].

§385.4 [Reserved].

**Subpart B – Physical Phonorecord Deliveries,
Permanent Downloads, Ringtones, and Music Bundles.**

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

- (a) ***Physical phonorecord deliveries and Permanent Downloads.*** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) ***Ringtones.*** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.
- (c) ***Music Bundles.*** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

- (a) ***Applicable royalty.*** A Service Provider that engages in Covered Activity licensed under this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types

of services described in §385.22; provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part. A Service Provider that engages in Covered Activity licensed pursuant to license agreements entered into by the Service Provider and Copyright Owners shall not pay royalties under this subpart for Covered Activity that is subject to a voluntary license

- (b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider offers different Offerings, royalties must be calculated separately with respect to each Offering; provided that, Service Provider Revenue and TCC, as applicable, associated with such different Offerings shall be allocated between such different Offerings to prevent subjecting all or any portion of Service Provider Revenue and TCC, as applicable, to a royalty calculation more than once in an Accounting Period. If a Service Provider provides Plays of Covered Activity and Plays of Non-Eligible Works as part of a single Offering in an Accounting Period, such that some reproductions and distributions of musical works within such Offering are eligible for licensing pursuant to 17 U.S.C. 115 and some are not, then the royalty payments to be calculated pursuant to this paragraph (b) shall allocate Service Revenue and TCC, as applicable, between Covered Activity and activities that are not Covered Activity. Such calculation shall be determined for each Offering by multiplying the Service Provider Revenue and, for Subscription Offerings, TCC, in an Accounting Period by the Allocation; provided that, to the extent either Net Advertising Revenues or Net Subscription Revenues have previously been attributed solely to Covered Activities, no multiplication of Net Advertising Revenues or Net Subscription Revenues, as applicable, by the Allocation shall be performed.

(1) **Step 1: Calculate the All-In Royalty for the Offering.**

- (i) Subscription Offerings. For each Accounting Period, the all-in royalty for Subscription Offering in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue and (B) the applicable percent of TCC, as set forth in table below:

	2023 – 2027
Percent of Revenue	Final non-appealable rate established in Phonorecords III for 2022, provided such rate is not a per-Play fee.
Percent of TCC	Final non-appealable rate established in Phonorecords III for 2022.

- (ii) Non-Subscription Offerings. For each Accounting Period, the all-in royalty for non-Subscription Offerings in this subpart (other than

Plays subject to subpart D of this part) shall be the applicable percent of Service Provider Revenue set forth in paragraph (b)(1)(i) of this section.

- (2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalties that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Covered Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also making public performances of musical works that are not Covered Activity. In the case in which the Service Provider is also making public performances of musical works that are not Covered Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Covered Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-Play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 of paragraph (b)(4) of this section.
- (3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Covered Activity for a particular Offering during the Accounting Period. This amount is the greater of:
 - (i) The result determined in step 2 in paragraph (b)(2) of this section; and
 - (ii) The royalty floor (if any) resulting from the calculations described in §385.22, multiplied by the Allocation.
- (4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Covered Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject

to subpart D of this part and Plays of Non-Eligible Works) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

The royalties payable under this paragraph (b)(4) for works still subject to copyright shall be paid to the Mechanical Licensing Collective; provided that, to the extent reproductions and distributions of musical works as part of a Covered Activity were made by a Service Provider pursuant to a voluntary license, royalty payments for such musical works shall be paid to the Copyright Owner that entered into a voluntary license with the Service Provider.

- (c) ***Overtime adjustment.*** For purposes of paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.
- (1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays
 - (2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays
 - (3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays
 - (4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays
 - (5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays
 - (6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.
- (d) ***Accounting.*** The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

§385.22 Royalty Floors for Specific Types of Offerings.

- (a) ***In general.*** The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Subscription Offerings.

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering—Streaming Only	15 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	30 cents per subscriber per month
Standalone Portable Subscription Offering	50 cents per subscriber per month
Bundled Subscription Offering	25 cents per month for each Active Subscriber during that month
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

- (b) ***Computation of royalty rates.*** For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Subscription Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product resulting from multiplying (1) the total number of subscriber-months for the Accounting Period by (2) the Allocation for the Subscription Offering by (3) the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

- (c) ***Adjustments to royalty floors.*** The following adjustments to royalty floors shall be made as applicable:

- (1) A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month.
- (2) A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.
- (3) An Annual Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Annual Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 12; provided that, the discount amount shall not exceed the value for 2 months of the undiscounted Subscription Offering purchased by the End User.
- (4) A Sixth-month Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Six-Month Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 6; provided that, the discount amount shall not exceed the value for 1 month of the undiscounted Subscription Offering purchased by the End User.
- (5) A Winback Offer subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Subscription Offering purchased by the End User and the denominator of which is the undiscounted price for the Subscription Offering purchased by the End User, subject to a maximum discount of 50% and a maximum duration of 6 months.
- (6) Where carrier-billing charges, carriage or in-app commission fees, or any other fees to platform, device or other distribution partners are paid in connection with transactions for a Subscription Offering and deducted from the relevant gross revenue calculation, the royalty floor for such End User shall be multiplied by a fraction, the numerator of which is the effective reduced price for the Subscription Offering and the denominator is the stated retail price for the Subscription Offering.

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

- (a) ***Promotional Offerings.*** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.
- (b) ***Free Trial Offerings.*** For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (c) ***Certain Purchased Content Locker Services.*** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (d) The royalty floor is zero for End User accounts used for Demo Accounts and for up to 15,000 Promoter Accounts.

TAB C

PROPOSED RATES AND TERMS OF GOOGLE LLC

[Redlined Edits]¹

Subpart A—Regulations of General Application

§385.1 General.

- (a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.
- (b) **Legal compliance.** Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.
- (c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.
- (d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part. The terms in this part shall be interpreted to prevent the double payment of royalties for Covered Activities.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

¹ Redlined edits are to the Services' Joint Written Direct Remand Submission in re Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), Docket No. 16-CRB-003-PR (2018-2022) (Remand), Tab C (Apr. 5, 2021).

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Allocation means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Covered Activities and the denominator of which is the sum of the number of Plays arising from Covered Activities and the number of Plays of Non-Eligible Works.

Annual Plans means a discounted plan where an End User subscriber pays a discounted price for a full year of access to a Subscription Offering.

Applicable Consideration means anything of value given for the identified rights to undertake a Covered Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Covered Activity but nevertheless provide consideration for the identified rights to undertake the Covered Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Covered Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Covered Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Bundle Percentage means [TBD based upon final, non-appealable determination in Phonorecords III].

Bundled Subscription Offering means a Subscription Offering providing ~~Licensed~~Covered Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the ~~subscription service providing Licensed Activity~~Subscription Offering separate from the product(s) or service(s) with which it is made available (e.g., a case in which an End User can buy a portable device and one-year access to a ~~subscription service providing Licensed Activity~~Subscription Offering for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Covered Activity means the activity of making a Digital Phonorecord Delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under 17 U.S.C. 115.

Demo Accounts means (1) accounts provided to business owners or operators for in-store demonstrations of an Offering to the public for private use and (2) Promoter Accounts.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

~~an (1) An amount of time not to exceed one month~~ 31 days from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed ~~one month~~ 31 days), or in the case of a subscription plan, a period of time following the end of the applicable subscription ~~no longer than a subscription renewal period or three months, whichever is shorter; or.~~

~~(2) — A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.~~

End User means each unique person that (1) ~~Pays~~ pays a subscription fee for an Offering during the relevant Accounting Period or (2) ~~Makes~~ makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when ~~neither (1) — Neither~~ the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering; beyond nominal amounts (e.g., \$1 per month per End User).

~~(2) — The free usage does not exceed 30 consecutive days per subscriber per two-year period;~~

~~(3) — In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;~~

~~(4) — Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;~~

~~(5) — The Free Trial Offering is made available to the End User free of any charge; and~~

~~(6) — The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider.~~

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

~~Licensed Activity, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.~~

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User’s first request to use the sound recording via the Locker Service. The term Locker

Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes, and any carriage or in-app commission fees (if any). Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

Net Subscription Revenues means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering (pro rated for a Bundled Subscription Offering by multiplying the dollar value of the Bundled Subscription Offering by the Bundle Percentage)), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions. Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also

excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

Non-Eligible Works means a sound recording, whether or not embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, and all audiovisual works that include musical works and all audiovisual works without any musical works, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

Offering means a Service Provider’s engagement in ~~Licensed~~Covered Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license ~~fee~~fees payable for the right to perform publicly musical works in any ~~of the forms covered by subparts C and D of this part~~Offering.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promoter Account means an account used by a person who works for or on behalf of an original equipment manufacturer, wireless carrier, third party with whom Licensee has entered into an agreement to provide a bundled offering of two or more products or services, one of which includes a Covered Activity, a sound recording or musical work copyright owner, or an influencer, to demonstrate, promote, influence or encourage the use of a Covered Activity.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

~~(2) — For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works~~

license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;

~~(3) — For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);~~

(4~~2~~) The Promotional Offering is made available to an End User for free ~~of any charge;~~ and/or for a nominal fee (e.g., \$1).

~~(5) — The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.~~

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords~~;~~:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue means, for each Offering, and for each Accounting Period, the sum of Net Advertising Revenues, if any, and Net Subscription Revenues, if any.

~~Service Provider Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean:~~

~~(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;~~

~~(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of any Offering, i.e., advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and~~

~~(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of~~

~~the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.~~

~~(2) — Service Provider Revenue shall:~~

~~(i) — Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and~~

~~(ii) — Include the value of any barter or other nonmonetary consideration; and~~

~~(iii) — Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.~~

~~(3) — Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.~~

~~(4) — For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.~~

~~(5) — In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the revenue recognized from End Users for the bundle less the standalone published price for End Users for each of the other component(s) of the bundle; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.~~

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted [subscription to a](#) Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a ~~bundle with one or more other products or services~~ [Bundle Subscription Offering](#).

Total Cost of Content or TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. ~~As used in this definition, “Applicable Consideration” means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.~~

United States means the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Winback Offer means a Subscription Offering made available for free or for a discount to an End User that had previously subscribed to a Subscription Offering for over six months and whose subscription has lapsed.

§385.3 Late payments [Reserved].

~~A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(e)(2)(I) or 17 U.S.C. 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.~~

§385.4 Recordkeeping for promotional or free trial non-royalty bearing uses [Reserved].

~~(a) — General. A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.~~

~~(b) — Retention of records. A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.~~

~~(c) — Availability of records. If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.~~

Subpart B – Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles.

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

- (a) ***Physical phonorecord deliveries and Permanent Downloads.*** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) ***Ringtones.*** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.
- (c) ***Music Bundles.*** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

- (a) **Applicable royalty.** ~~Licensees that engage in Licensed~~ A Service Provider that engages in Covered Activity covered by licensed under this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in ~~subsection (b) of this subpart, §385.22;~~ provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part. A Service Provider that engages in Covered Activity licensed pursuant to license agreements entered into by the Service Provider and Copyright Owners shall not pay royalties under this subpart for Covered Activity that is subject to a voluntary license
- (b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider ~~includes~~ offers different Offerings, royalties must be calculated separately with respect to each Offering ~~taking into consideration;~~ provided that, Service Provider Revenue and ~~expenses~~ TCC, as applicable, associated with ~~each Offering. For purposes of calculating rates pursuant to this section and all of its subparts, a Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan in effect for only part of a calendar month and a Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.~~ such different Offerings shall be allocated between such different Offerings to prevent subjecting all or any portion of Service Provider Revenue and TCC, as applicable, to a royalty calculation more than once in an Accounting Period. If a Service Provider provides Plays of Covered Activity and Plays of Non-Eligible Works as part of a single Offering in an Accounting Period, such that some reproductions and distributions of musical works within such Offering are eligible for licensing pursuant to 17 U.S.C. 115 and some are not, then the royalty payments to be calculated pursuant to this paragraph (b) shall allocate Service Revenue and TCC, as applicable, between Covered Activity and activities that are not Covered Activity. Such calculation shall be determined for each Offering by multiplying the Service Provider Revenue and, for Subscription Offerings, TCC, in an Accounting Period by the Allocation; provided that, to the extent either Net Advertising Revenues or Net Subscription Revenues have previously been attributed solely to Covered Activities, no multiplication of Net Advertising Revenues or Net Subscription Revenues, as applicable, by the Allocation shall be performed.
- (1) **Step 1: Calculate the All-In Royalty for the Offering.**
- (i) **Subscription Offerings.** For each Accounting Period, the all-in royalty for ~~all Offerings~~ Subscription Offering in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue ~~as set forth~~

~~in in Column A of the table below~~ and (B) the applicable percent of TCC ~~or TCC amount,~~ as set forth in ~~Column B of the table below~~:

Offering	Column A % of Service Provider Revenue	Column B TCC % or TCC Amount
Standalone Non-Portable Subscription Offering—Streaming Only	10.5 %	The lesser of 22 % of TCC for the Accounting Period or 50 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	10.5 %	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month
Standalone Portable Subscription Offering	10.5 %	The lesser of 21 % of TCC for the Accounting Period or 80 cents per subscriber per month
Bundled Subscription Offering	10.5 %	21 % of TCC for the Accounting Period
Mixed Service Bundle	11.35%	21% of TCC for the Accounting Period
Limited Offering	10.5%	21% of TCC for the Accounting Period
Paid Locker Service	12%	20.65% of TCC for the Accounting Period
Purchased Content Locker Service	12%	22% of TCC for the Accounting Period
Free nonsubscription/ad-supported services free of any charge to the End User	10.5%	22% of TCC for the Accounting Period <u>2023 – 2027</u>
<u>Percent of Revenue</u>		<u>Final non-appealable rate established in Phonorecords</u>

Offering	Column A % of Service Provider Revenue	Column B TCC % or TCC Amount
		<u>III for 2022, provided such rate is not a per-Play fee.</u>
<u>Percent of TCC</u>		<u>Final non-appealable rate established in Phonorecords III for 2022.</u>

(ii) Non-Subscription Offerings. For each Accounting Period, the all-in royalty for non-Subscription Offerings in this subpart (other than Plays subject to subpart D of this part) shall be the applicable percent of Service Provider Revenue set forth in paragraph (b)(1)(i) of this section.

(2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance ~~Royalty~~Royalties that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute ~~Licensed~~Covered Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also ~~engaging in~~making public ~~performance~~performances of musical works that ~~does not constitute Licensed~~are not Covered Activity. In the case in which the Service Provider is also ~~engaging in the~~making public ~~performance~~performances of musical works that ~~does not constitute Licensed~~are not Covered Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to ~~Licensed~~Covered Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where ~~per-play~~per-Play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 of paragraph (b)(4) of this section.

(3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical

works used by the Service Provider by virtue of its ~~Licensed~~Covered Activity for a particular Offering during the Accounting Period. This amount is the greater of:

- (i) The result determined in step 2 in paragraph (b)(2) of this section;⁵ and
- (ii) The royalty floor (if any) ~~set forth in the following table:~~resulting from the calculations described in §385.22, multiplied by the Allocation.

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering — Streaming Only	15 cents per subscriber per month
Standalone Non-Portable Subscription Offering — Mixed	30 cents per subscriber per month
Standalone Portable Subscription Offering	50 cents per subscriber per month
Bundled Subscription Offering	25 cents per month for each Active Subscriber during that month
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

~~Computation of royalty floors.~~ For purposes of this paragraph (b)(3), to determine the royalty floor, as applicable to any particular ~~Offering~~, the total number of subscriber months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an

~~Offering subject to subpart D, except in the case of a Bundled Subscription Offering where subscriber months shall be determined with respect to Active Subscribers. The product of the total number of subscriber months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.~~

- (4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its ~~Licensed~~Covered Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this ~~step~~paragraph (b)(4) only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

The royalties payable under this paragraph (b)(4) for works still subject to copyright shall be paid to the Mechanical Licensing Collective; provided that, to the extent reproductions and distributions of musical works as part of a Covered Activity were made by a Service Provider pursuant to a voluntary license, royalty payments for such musical works shall be paid to the Copyright Owner that entered into a voluntary license with the Service Provider.

- (~~a~~c) **Overtime adjustment.** For purposes of ~~the calculations in step 4 in this~~ paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

- (1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays
- (2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays

- (3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays
- (4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays
- (5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays
- (6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(d) **Accounting.** The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

§385.22 Royalty Floors for Specific Types of Offerings.

(a) **In general.** The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Subscription Offerings.

<u>Offering</u>	<u>Royalty Floor</u>
<u>Standalone Non-Portable Subscription Offering—Streaming Only</u>	<u>15 cents per subscriber per month</u>
<u>Standalone Non-Portable Subscription Offering—Mixed</u>	<u>30 cents per subscriber per month</u>
<u>Standalone Portable Subscription Offering</u>	<u>50 cents per subscriber per month</u>
<u>Bundled Subscription Offering</u>	<u>25 cents per month for each Active Subscriber during that month</u>
<u>Mixed Service Bundle</u>	<u>n/a</u>
<u>Limited Offering</u>	<u>n/a</u>
<u>Paid Locker Service</u>	<u>n/a</u>
<u>Purchased Content Locker Service</u>	<u>n/a</u>
<u>Free nonsubscription/ad-supported services free of any charge to the End User</u>	<u>n/a</u>

(b) **Computation of royalty rates.** For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Subscription Offering, the total number of subscriber-months for the Accounting Period, shall be

calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product resulting from multiplying (1) the total number of subscriber-months for the Accounting Period by (2) the Allocation for the Subscription Offering by (3) the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(c) *Adjustments to royalty floors.* The following adjustments to royalty floors shall be made as applicable:

- (1) A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month.
- (2) A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.
- (3) An Annual Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Annual Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 12; provided that, the discount amount shall not exceed the value for 2 months of the undiscounted Subscription Offering purchased by the End User.
- (4) A Sixth-month Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Six-Month Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 6; provided that, the discount amount shall not exceed the value for 1 month of the undiscounted Subscription Offering purchased by the End User.
- (5) A Winback Offer subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Subscription Offering purchased by the End User and the denominator of which is the undiscounted price for the Subscription Offering purchased by the End User, subject to a maximum discount of 50% and a maximum duration of 6 months.
- (6) Where carrier-billing charges, carriage or in-app commission fees, or any other fees to platform, device or other distribution partners are paid in connection with transactions for a Subscription Offering and deducted from the relevant gross revenue calculation, the royalty floor for such End User

shall be multiplied by a fraction, the numerator of which is the effective reduced price for the Subscription Offering and the denominator is the stated retail price for the Subscription Offering.

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

- (a) **Promotional Offerings.** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.
- (b) **Free Trial Offerings.** For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (c) **Certain Purchased Content Locker Services.** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (d) ~~Unauthorized use. If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.~~ The royalty floor is zero for End User accounts used for Demo Accounts and for up to 15,000 Promoter Accounts.

TAB D

INDEX OF WITNESS TESTIMONY

<u>Witness</u>	<u>Title</u>
Carletta Higginson	Director and Global Head of Music Publishing of YouTube Division
Gregory K. Leonard	Vice President of Charles River Associates (CRA)

TAB E

INDEX OF EXHIBITS

<u>Ex. No.</u>	<u>Restricted</u>	<u>Sponsored By</u>	<u>Description</u>	<u>Bates No.</u>
Google Ex. 01	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00003911-20
Google Ex. 02	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00003901-10
Google Ex. 03	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00002838-59
Google Ex. 04	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00002870-85
Google Ex. 05	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00002914-43
Google Ex. 06	Yes	Carletta Higginson	[REDACTED] License Agreement	GOOG-PHONOIV-00002944-66
Google Ex. 07	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003921
Google Ex. 08	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003922-23
Google Ex. 09	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003924-28
Google Ex. 10	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003929
Google Ex. 11	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003930
Google Ex. 12	Yes	Carletta Higginson	Music Publishers signed onto [REDACTED]	GOOG-PHONOIV-00003931-32

Google Ex. 13	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00001366-93
Google Ex. 14	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00000241-80
Google Ex. 15	Yes	Carletta Higginson	Shorts Creation Amendment to Publishing License Agreement between Google LLC and [REDACTED]	GOOG-PHONOIV-00000281-86
Google Ex. 16	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002209-58
Google Ex. 17	Yes	Carletta Higginson	Amendment No. 1 to Publishing License [REDACTED] and Google LLC	GOOG-PHONOIV-00000014-17
Google Ex. 18	Yes	Carletta Higginson	Amendment No. 2 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00003636-41
Google Ex. 19	Yes	Carletta Higginson	Amendment No. 3 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00003642-46

Google Ex. 20	Yes	Carletta Higginson	Amendment No. 4 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00003647-51
Google Ex. 21	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002980-89
Google Ex. 22	Yes	Carletta Higginson	Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002969-78
Google Ex. 23	Yes	Carletta Higginson	Extension to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002979
Google Ex. 24	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003281-99
Google Ex. 25	Yes	Carletta Higginson	Amendment No. 1 to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002990-92
Google Ex. 26	Yes	Carletta Higginson	Amendment No. 2 to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002993-98

Google Ex. 27	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002286-302
Google Ex. 28	Yes	Carletta Higginson	Amendment No. 1 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002326-27
Google Ex. 29	Yes	Carletta Higginson	Amendment No. 2 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002328
Google Ex. 30	Yes	Carletta Higginson	Amendment No. 3 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002329
Google Ex. 31	Yes	Carletta Higginson	Amendment No. 4 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002330
Google Ex. 32	Yes	Carletta Higginson	Amendment No. 5 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002331
Google Ex. 33	Yes	Carletta Higginson	Amendment No. 6 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002332
Google Ex. 34	Yes	Carletta Higginson	Amendment No. 7 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002333

Google Ex. 35	Yes	Carletta Higginson	Amendment No. 8 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002334
Google Ex. 36	Yes	Carletta Higginson	Amendment No. 9 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002335
Google Ex. 37	Yes	Carletta Higginson	Amendment No. 10 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002336
Google Ex. 38	Yes	Carletta Higginson	Amendment No. 11 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002337
Google Ex. 39	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC (renewal)	GOOG-PHONOIV-00002303-25
Google Ex. 40	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003704-13
Google Ex. 41	Yes	Carletta Higginson	Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003652-65

Google Ex. 42	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002452-61
Google Ex. 43	Yes	Carletta Higginson	Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002462-71
Google Ex. 44	Yes	Carletta Higginson	Amendment No. 2 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002472
Google Ex. 45	Yes	Carletta Higginson	Amendment No. 3 to Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002473
Google Ex. 46	Yes	Carletta Higginson	Amended and Restated Publishing Licensing Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00002474-2503
Google Ex. 47	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003722-40
Google Ex. 48	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003192-207

Google Ex. 49	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003011-29
Google Ex. 50	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003030-48
Google Ex. 51	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003208-26
Google Ex. 52	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003227-42
Google Ex. 53	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google, Inc. and its affiliates	GOOG-PHONOIV-00003243-61
Google Ex. 54	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003262-80
Google Ex. 55	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003049-67
Google Ex. 56	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003068-86

Google Ex. 57	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003087-3105
Google Ex. 58	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003300-18
Google Ex. 59	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003319-37
Google Ex. 60	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google, Inc.	GOOG-PHONOIV-00003338-56
Google Ex. 61	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003106-24
Google Ex. 62	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003163-81
Google Ex. 63	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003373-88
Google Ex. 64	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003408-26
Google Ex. 65	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003427-45

Google Ex. 66	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003389-407
Google Ex. 67	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003144-62
Google Ex. 68	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003446-61
Google Ex. 69	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003462-80
Google Ex. 70	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003481-99
Google Ex. 71	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003500-15
Google Ex. 72	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003523-41
Google Ex. 73	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003542-57
Google Ex. 74	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003615-33

Google Ex. 75	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003596-612
Google Ex. 76	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003558-76
Google Ex. 77	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003577-95
Google Ex. 78	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00001646-61
Google Ex. 79	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002860-69
Google Ex. 80	Yes	Carletta Higginson	Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002886-96
Google Ex. 81	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003685-703
Google Ex. 82	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003125-43
Google Ex. 83	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00001763-78

Google Ex. 84	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003666-84
Google Ex. 85	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002897-913
Google Ex. 86	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00001779-97
Google Ex. 87	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003516-22
Google Ex. 88	Yes	Carletta Higginson	Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00002999-3010
Google Ex. 89	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc., Google Ireland Ltd. and Google Commerce Ltd.	GOOG-PHONOIV-00002083-2101
Google Ex. 90	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003714-21
Google Ex. 91	Yes	Carletta Higginson	Settlement Agreement and Release between [REDACTED] and Google Inc.	GOOG-PHONOIV-00003745-803

Google Ex. 92	Yes	Carletta Higginson	Publishing License Agreement between [REDACTED] and Google LLC	GOOG-PHONOIV-00003804-26
Google Ex. 93	Yes	Carletta Higginson	[REDACTED]	GOOG-PHONOIV-00003933-34
*			Publishing License Agreement between [REDACTED] and Google Inc.	
*			Amendment to Publishing License Agreement between [REDACTED] and Google Inc.	
*			Publishing License Agreement between [REDACTED] and Google Inc.	
*			Publishing License Agreement between [REDACTED] and Google Inc.	
*			Publishing License Agreement between [REDACTED] and Google Inc.	

* The content of these remaining negotiated agreements provides additional cumulative support for Google's Written Direct Statement. They will be produced during discovery as soon as contractual notice requirements are satisfied so the participants can confirm.

TAB F

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**DECLARATION AND CERTIFICATION OF VICTOR JIH
ON BEHALF OF GOOGLE LLC**

1. I am counsel for Google LLC (“Google”) in the above-captioned case. I submit this declaration and certification pursuant to the terms of the Protective Order issued July 20, 2021. I am authorized by Google to submit this Declaration.

2. I have reviewed Google’s Written Direct Statement, witness statements, and exhibits. I have also reviewed the definition and terms provided in the Protective Order. After consultation with my client, I have determined to the best of my knowledge, information, and belief, that portions of Google’s Written Direct Statement, witness statements, and accompanying exhibits contain information that is “Restricted” material as defined by the Protective Order.

3. The Restricted materials include testimony and exhibits related to contracts, terms, and contract strategy that are proprietary, not available to the public, highly sensitive, and subject to confidentiality provisions with third parties. This is information that Google is required to keep confidential and does keep confidential.

4. If this information were to become public, it would place Google at a commercial and competitive disadvantage, unfairly advantage other parties, and jeopardize Google's business interests. Information related to confidential contacts or relationships with third-party content providers could be used by Google competitors, or by other content providers, to formulate rival bids, bid up Google payments, or otherwise unfairly jeopardize Google commercial and competitive interests.

5. With respect to financial information in the Restricted materials, I understand that Google has not disclosed to the public or the investment community the financial information that it seeks to restrict here (including spending and cost information, specific royalty payment information, and the like). As a result, neither Google's competitors nor the investing public has been privy to that information, which Google has viewed as highly confidential and sensitive, and has guarded closely. Google could experience negative market repercussions, competitive disadvantage, and even possible legal exposure were this confidential financial information released publicly without proper context or explanation.

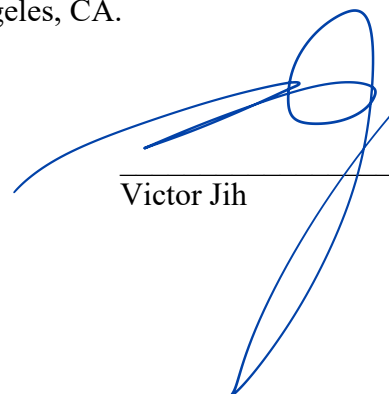
6. The written direct statement of Carletta Higginson, Director and Global Head of Music Publishing of YouTube Division, contains material, non-public information concerning Google's business of music streaming, Google's rate proposal, Google's music-related services, and Google's licenses with publishers. None of this information is publicly known or available. Disclosure of the financial details of these contractual arrangements and non-public financial data would, for reasons discussed in paragraphs 4 and 5 above among others, competitively disadvantage Google.

7. The written direct statement of Gregory K. Leonard contains material, non-public information concerning the particular rates agreed to by specific Google direct licensors, and

material non-public financial data concerning payments to publishers and record labels, revenue, and similar information for other services that has been designated as “Restricted.” None of this information is publicly known or available. Disclosure of this information would, for reasons discussed in paragraphs 4 and 5 above, competitively disadvantage Google.

8. The information designated as “Restricted” must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Google to provide the Judges with the most complete record possible on which to base their determination in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct, and that I executed this Declaration on October 13, 2021 in Los Angeles, CA.



Victor Jih

TAB G

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

CERTIFICATE OF SERVICE

I am employed in Los Angeles, California. I am over the age of 18 years and not a party to this action. My business address is 633 West Fifth St., Suite 1550, Los Angeles, CA 90071.

I hereby certify that on October 13, 2021, I caused a copy of the foregoing Written Direct Statement of Google to be served via electronic mail delivery to the people set forth below, who have consented to electronic mail service.

Joseph R. Wetzel
Andrew M. Gass
LATHAM & WATKINS LLP 505
Montgomery Street San Francisco, California 94111
Tel.: (415) 391-0600
joe.wetzel@lw.com
andrew.gass@lw.com

Allison L. Stillman
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Tel.: (212) 906-1200
alli.stillman@lw.com

**Google Written Direct Statement
Dkt. No. 21-CRB-0001-PR (2023-2027)**

Sarang Vijay Damle
William F. Friedman
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Tel.: (202) 637-2200
sy.damle@lw.com
william.friedman@lw.com

Counsel for Spotify USA Inc.

Joshua D. Branson
Scott H. Angstreich
Aaron M. Panner
Leslie V. Pope
Kylie C. Kim
Christopher M. Young
KELLOGG, HANSEN, TODD, FIGEL, & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400 Washington, D.C. 20036
Tel.: (202) 326-7900
jbranson@kellogghansen.com
sangstreich@kellogghansen.com
apanner@kellogghansen.com
lpope@kellogghansen.com
kkim@kellogghansen.com
cyoung@kellogghansen.com

Counsel for Amazon.com Services LLC

Mary C. Mazzello (N.Y. Bar No. 5022306)
Dale M. Cendali (N.Y. Bar No. 1969070)
Claudia Ray (N.Y. Bar No. 2576742)
KIRKLAND & ELLIS LLP 6
01 Lexington Avenue, 42nd Floor New York, NY 10022
Tel. (212) 446-4800
Fax: (212) 446-4900
mary.mazzello@kirkland.com
dale.cendali@kirkland.com
claudia.ray@kirkland.com

Counsel for Apple Inc.

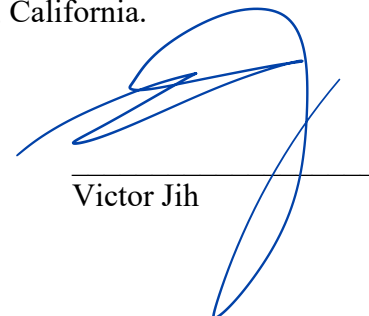
Donald S. Zakarin
Frank P. Scibilia
Benjamin K. Semel
Joshua Weigensberg
Lauren B. Cooperman
PRYOR CASHMAN LLP
7 Times Square New York, New York 10036-6569
Telephone: (212) 421-4100
dzakarin@pryorcashman.com
fscibilia@pryorcashman.com
bsemel@pryorcashman.com
jweigensberg@pryorcashman.com
lcooperman@pryorcashman.com

Counsel for the Copyright Owners

Benjamin E. Marks
David J. Bier
Todd D. Larson
Jeremy P. Auster
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007
benjamin.marks@weil.com
david.bier@weil.com
todd.larson@weil.com
jeremy.auster@weil.com

Counsel for Pandora Media, LLC

I declare under penalty of perjury that the foregoing is true and correct, and that I executed this Declaration on October 13, 2021 in Los Angeles, California.



Victor Jih

Proof of Delivery

I hereby certify that on Friday, October 22, 2021, I provided a true and correct copy of the PUBLIC - Written Direct Statement of Google LLC - Volume 1 of 3 to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Signed: /s/ Victor Jih